IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 338 of 2002

with

CIVIL APPLICATION NO.5644 OF 2002
in
APPEAL FROM ORDER No 338 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 - yes; 3 to 5 - No.

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SR. REGIONAL MANAGER, FOOD CORPORATION OF INDIA

Versus

SUNIL AGENCIES, PROP. SUNIL AWAT JETHWANI

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Appearance:

1. Appeal from Order No. 338 of 2002
M/S THAKKAR ASSOC. for appellant Nos. 1-2
MR KG SUKHWANI for respondent

2. Civil Application No.5644 of 2002
M/S THAKKAR ASSOC. for applicant Nos.1-2
MR KG SUKHWANI for opponent

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CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 13/09/2002

COMMON C.A.V. JUDGEMENT

This Appeal From Order has been filed by the original defendants being aggrieved by the order dated 23-7-2002 passed by the learned Chamber Judge, City Civil Court, Ahmedabad in Civil Suit No.2450 of 2002 whereby the learned Chamber Judge, while directing the defendants to deposit the instrument issued by the plaintiff and on realising the same, ordered to consider the plaintiff's tender on merits along with the other participants without considering the clause No.4 of the tender as an obstruction against the plaintiff.

2. At the initial stage, learned counsel, Mr.K.G.Sukhwani has appeared on caveat on behalf of the respondent. Later on, matter was admitted and Mr.Sukhwani waived service of notice on behalf of the respondent.

3. Thereafter, I have heard learned Senior counsel, Mr.P.M.Thakkar for the appellants and learned counsel, Mr.K.G.Sukhwani for the respondent.

4. Mr.Thakkar has mainly argued that gross error has been committed by the learned Chamber Judge in directing the appellants-original defendants to consider the tender of the respondent-original plaintiff ignoring clause No.4 of the tender submitted by the respondent. He has drawn my attention towards clause No.4 of the tender document which reads as under:

> "(4) Earnest Money : Tender form must be accompanied by an earnest Money of Rs.7,56,000/(Rupees Seven Lacs Fifty Six Thousand only) in form of a demand draft issued by the state Bank of India or a Scheduled Bank in favour of the Sr.Regional Manager, Food Corporation of India, Tenders not accompanies by earnest money in the form prescribed above shall be summarily rejected."

Drawing my attention towards the above clause, it is contended that clause No.4 makes it mandatory on the part of the tenderers to deposit the earnest money and failing to comply with the same would result in summary rejection

of tender. He has relied upon the case of Tata Cellular Vs. Union of India, reported in AIR 1996 S.C. 32 wherein the Supreme Court has laid down the following principles:

"113. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender, or award the contract is reached by process of negotiations through several tires. more often than not such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In order words a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of Wednesday principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose, heavy administrative burden on the administrative and lead to increased and unbudgeted expenditure."

It is further contended that in view of the above principles laid down by the Apex Court, the terms of the invitation of tender are not open to judicial scrutiny as

expressly stated in the contract itself and hence, interference by the learned Judge is against the settled principle of law. It is further contended by Mr.Thakkar that variance in the clauses of the tender document would amount to interfering with the policy matters of the Corporation which, as a matter of fact, is not permissible. It is also contended that the appellant is entitled to satisfy itself about the financial position of the tenderer by imposing such conditions as it may deem fit. As per the settled principle of law, granting of the main relief at the interim stage is not permissible as it amounts to allowing the main suit and hence, it was prayed that the impugned order be set aside.

5. Mr.K.G.Sukhwani has mainly contended that as per clause No.4 of the tender, tender form must be accompanied by earnest money of Rs.7,56,000/- in form of a demand draft issued by the State Bank of India or a Scheduled Bank and respondent has furnished the earnest money deposit by way of demand draft of Rs.5,46,000/dated 14-6-2002 issued by Central Bank of India, Gandhidham which is a scheduled bank and rest of Rs.2,10,000/- by way of pay order dated 14-6-2002 of HDFC Bank payable at Ahmedabad issued by Gandhidham Co-Op. Bank Ltd., Adipur thereby the respondent has substantially complied with the aforesaid clause of the tender and therefore, the stand taken by the defendant is hyper-technical. He has also contended that the offer submitted by the respondent was the lowest and even considering the interest of Food Corporation of India, tender of the respondent would not have been rejected at initial stage as the Corporation would be incurring a loss of Rs.21.00 lacs. and hence, the order passed by the court below being just and proper, is not required to be interferred with and this Appeal From Order is required to be rejected.

6. Considering the contentions made on behalf of the parties, it appears that clause No.4 of the tender document of furnishing earnest money deposit by way of demand draft issued by a Scheduled Bank is not fulfilled by the respondent. It is to be noted in this regard that the demand draft dated 14-6-2002 for of Rs.5,46,000/-furnished by the respondent was of the Scheduled Bank, however, pay order dated 14-6-2002 for the rest of the amount of Rs.2,10,000/- was not of the Scheduled Bank and, therefore, tender of the respondent has been summarily rejected by the appellant Corporation as a breach of clause No.4 has been committed by him.

7. Now the question to be decided by this Court in

this appeal is as to whether the terms of the tender are open to judicial scrutiny by the court of law. Heavy reliance has been placed by the learned counsel for the appellant on the case of Tata Cellular (supra) more particularly towards para 3 wherein it has been specifically held that the Court does not have the expertise to correct the administrative decision and hence if the administrative decision is permitted to be reviewed, it will be substituting its own decision without the necessary expertise which itself may be fallible. In para 4 of the aforesaid judgment, the law has been settled by the Apex Court by holding that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Therefore, any variance in any of the terms or clauses of the tender by the Court would be against the settled legal position and also against policy decision of the appellant Corporation which is uniformly applied to the contractors all over the country.

8. A contention has been raised by Mr.Sukhwani on behalf of the respondent that by not accepting the lowest tender of the respondent, the Corporation would be incurring loss of Rs.21.00 lacs.

9. In this connection, reliance is placed on a decision of the Supreme Court in the case of W.B.State Electricity Board Vs.Patel Engineering Co.Ltd. and Ors., (2001) 2 SCC 451 more particularly towards head note (E) which reads as under:

> "E.Government Contracts--Tenders--Lowest bid--Held, rules and conditions have to be complied with, even in respect of the lowest bid--Principles of awarding contract to lowest tenderer, held applies when all things are equal--There is no obligation to award contract to lowest bidder--It is open to Government or its agency to negotiate with next lowest bidder and try to reach an economically viable and mutually acceptable price."

It has been held by the Apex Court in the above reported case that merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is clear that the rate offered by the respondent is the lowest. Since the clause No.4 of the tender has not been fulfilled by the respondent by furnishing the earnest money deposit by way of a demand

draft issued by the Scheduled Bank, it is not obligatory on the part of the appellant Corporation to accept the price quoted by the respondent though lowest. It has been specifically held by the Apex Court that negotiation with the next lowest bidder for awarding the contract on economically viable price bid was always open to the appellant Corporation. In view of the aforesaid decision of the Supreme Court, I do not find any force in the contention made by Mr.Sukhwani.

10. For the reasons stated hereinabove, since the decision taken by the appellant of rejecting the tender of the respondent is just and proper, interference by the Court below on the same is unjust and improper and hence, same deserves to be set aside and the appeal requires to be allowed.

11. This Appeal From Order is allowed. The order dated 23-7-2002 passed by the leaned City Civil Judge, Ahmedabad below application Ex.6 in Civil Suit No.2450 of 2002 is set aside. There shall be no order as to costs. In view of the aforesaid order passed in Appeal From Order, Civil Application for stay also stand disposed of. Rule is made absolute.

(R.P.DHOLAKIA,J.)

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FURTHER ORDER

At this stage, learned counsel for the respondent, Mr.Sukhwani has requested to stay the order for one month to approach the higher forum. It is to be noted that tender in question is regarding handling of foodrains and looking to the period, if tender will not be permitted to be finalised, interest of the people at large will be severely affected. Hence, request for stay is rejected. Direct service is permitted.

(R.P.DHOLAKIA,J.)

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